86-357

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Of Counsel:
WILLIAM S. BUSKER
Vice President,
Legal Affairs
American Trucking
Associations, Inc.
Alexandria, VA 22314

WALTER HELLERSTEIN
Professor of Law
University of Georgia
Law School
Athens, GA 30602

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Appellants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Pennsylvania's axle tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because, by simultaneously reducing registration fees for trucks registered in the State by amounts equal to the tax, Pennsylvania has caused the tax to be borne almost entirely by trucks registered outside the State.

2. Whether Pennsylvania's axle tax statute and its predecessor marker fee statute discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution because each imposes a substantially higher effective tax on trucks registered outside the State than on trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are plaintiff classes consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who were subject to the $25 identification marker fee requirement or who will be subject to the axle tax, in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Astro Container Company, which has no subsidiaries or affiliates, is a division of Allied Drum Services, Inc.

Appellant Interstate Truck Leasing, Inc., which has no affiliates or subsidiaries, is a subsidiary of Fred Taylor Company, Inc.

Appellant Interstate Van Lines, Inc., is a subsidiary of I.V.L. Corp. Interstate Van Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Ace Van & Storage Co., Inc.; A.E.M. Inc.; and Interstate International Inc.

Appellant Old Dominion Freight Line Inc. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are old Dominion Tank Leasing, Inc.; E & J Enterprises; Deaton, Inc.; and Road-Runners Freight System.

Appellant Tri-State Motor Transit Co. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Contract Operators Accounting Service; Aero Body & Truck Equipment, Inc.; LTL Leasing Co.; Loadus Truck Leasing, Inc.; H.G.O. Rigging & Storage Inc.; LKO Leasing Co.; Central States Transportation Co.; and J.H. Rose Truck Lines Co.

Appellees are the following defendant state officials, or their successors: James I. Scheiner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania; Leroy S. Zimmerman, Attorney General of the Commonwealth of Pennsylvania; and Nicholas G. Dellacipeste, Commissioner of the State Police of the Commonwealth of Pennsylvania.

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On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (J.S. App. A) is reported at 509 A.2d 838. The opinions of the en banc Commonwealth Court (J.S. Apps. C, D, and E) are reported at 87 Pa. Commw. 345, 487 A.2d 468 (marker fee), 87 Pa. Commw. 379, 487 A.2d 465 (axle tax), and 87 Pa. Commw. 418, 489 A.2d 269 (marker fee refund), respectively. The opinion of the single Commonwealth Court judge in the marker fee case (J.S. App. F) is reported at 77 Pa. Commw. 575, 466 A.2d 755.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (J.S. App. B) was entered on May 6, 1986. Notices of appeal to this Court (J.S. Apps. G, H, and I) were filed

on June 16, 1986. On July 25, 1986, Justice Brennan extended the time within which to docket the appeal to September 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves a challenge to the validity of state statutes under the Commerce Clause of the United States Constitution. The relevant Pennsylvania statutes are set forth in J.S. App. J.

STATEMENT

At issue in this case is the constitutionality under the Commerce Clause of the United States Constitution of Pennsylvania statutes imposing two highway use taxes—an annual $25 per truck marker fee, which was in effect from 1980 to 1983, and a $36 per axle ($180 per typical, five-axle truck) tax that superseded it and remains in effect today. The axle tax statute is challenged because, by simultaneously reducing its registration fees for in-state trucks by equal amounts, Pennsylvania manipulated its tax system to place virtually the entire burden of the axle tax on operators of trucks registered outside Pennsylvania. It is appellants' submission that the axle tax, which raises approximately $68 million per year, represents a classic example of unlawful discrimination against interstate commerce.

But even if this structural discrimination were eliminated, and Pennsylvania-registered trucks were actually made to sustain the burden of the axle tax, that tax and the marker fee would still violate the Commerce Clause because they are inherently discriminatory in operation. These exactions do not vary in amount with miles traveled on Pennsylvania's highways; accordingly, their per-mile costs decline as miles driven within the State increase. Because trucks based in Pennsylvania make

substantially greater use of its highways than foreign-based trucks, the result is to impose a far higher tax per mile on the typical out-of-state trucker than on his in-state competitor.

Despite the flagrant discrimination against interstate commerce that these statutes entail, and despite a strong dissent with respect to the validity of the axle tax, both statutes were upheld by the Supreme Court of Pennsylvania.

A. The Pennsylvania Tax Statutes.

Like every other state, Pennsylvania imposes a variety of taxes and fees on users of its highways, including relatively uncontroversial ones such as registration fees for vehicles based in the State and taxes on fuel purchased or used there. The revenues from Pennsylvania's highway taxes are placed in its Motor License Fund and expended for highway construction and maintenance or other road-related purposes (J.S. App. 3a). The current controversy arises because of Pennsylvania's adoption, beginning in 1980, of new forms of highway use taxes that fall disproportionately upon out-of-state truckers—a discrimination compounded by Pennsylvania's manipulation of its tax system to relieve its own truckers of virtually the entire cost of these new taxes.

1. *The Marker Fee.* In June 1980, Title 75 of Pennsylvania's Vehicle Code was amended to increase from $2 to $25 the identification marker fee that motor carrier vehicles (*i.e.*, trucks, truck tractors, or combinations) registered outside Pennsylvania and weighing more than 17,000 pounds pay as a condition of operating on the State's highways. 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1983) (reproduced at J.S. App. 80a-81a). For trucks registered in Pennsylvania the fee was "deemed a part of and included in the vehicle registration fee." 75 Pa. Cons. Stat. Ann. § 2102(b) (Purdon 1981) (J.S.

App. 6a). The $25 marker fee was a tax for the privilege of using Pennsylvania's roads; the administrative cost associated with the issuance of the markers was stipulated to be approximately $5 per vehicle. See Joint Stipulation of Facts in No. 315 C.D. 1982, ¶¶ 1, 6. The marker fee payments generated substantial revenues. For the twelve months beginning April 1, 1981, decals were purchased for nearly 400,000 non-Pennsylvania-based trucks at a cost of approximately $10 million (R. 267, 465).[1]

2. *The Axle Tax.* By legislation (sometimes referred to as "Act 234") passed in December 1982 and effective April 1, 1983, the marker fee was reduced to $5 per year.[2] In its place, however, Act 234 instituted a much larger impost—the axle tax. 75 Pa. Cons. Stat. Ann. § 9901 *et seq.* (J.S. App. 82a-86a). This tax, which applies to trucks weighing in excess of 26,000 pounds, requires an annual payment of $36 per axle. Depending on their size, the trucks subject to the tax have between two and five axles and are therefore subject to an annual tax of from $72 to $180.[3] The axle tax raises approximately $68 million annually (J.S. App. 34a).

The stated purpose of the axle tax is "to provide for the creation of jobs and for the rehiring of [Pennsylvania's] unemployed." 75 Pa. Cons. Stat. Ann. § 9907 (b) (J.S. App. 84a). All axle tax proceeds are placed in a new Highway Bridge Improvement Restricted Ac-

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[1] "R." refers to the reproduced record filed in the Supreme Court of Pennsylvania.

[2] Because this amount reflects costs actually incurred in administering the marker (decal) system, appellants did not contest the lawfulness of the reduced fee in the Pennsylvania courts and do not do so here.

[3] A portion of the tax is rebated for vehicles that make only "incidental" use of Pennsylvania's highways. Under Section 9905 (J.S. App. 83a-84a), vehicles traveling fewer than 2,000 miles a year in Pennsylvania may obtain a rebate proportionate to their reduced mileage.

count within the Motor Vehicle Fund. The law requires that firms with Pennsylvania-based facilities be "actively solicited to make bids on contracts to furnish products and materials" to be used in projects funded by the Account (*ibid.*).

Unlike the marker fee, which had to be paid only for trucks registered outside of Pennsylvania, the axle tax on its face applies equally to Pennsylvania-based and to non-Pennsylvania-based trucks. However, the enactment that created the axle tax also provided for a simultaneous reduction in registration fees paid by Pennsylvania-based trucks subject to the axle tax. This reduction was in nearly all instances identical in amount to the axle tax.[4] The result is that the cost of the axle tax has been borne almost entirely by interstate truckers operating non-Pennsylvania-based vehicles on the State's highways, while Pennsylvania-based operators have been largely relieved of any financial burden despite their nominal obligation to pay the tax.[5]

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[4] The axle tax is, as noted, assessed on the basis of the number of a vehicle's axles. Truck registration fees, by contrast, increase with the weight of the vehicle. Compare 75 Pa. Cons. Stat. Ann. § 9902 with *id.* at § 1916(a) (J.A. App. 82a, 86a-87a). While there is a direct correlation between weight and number of axles, and while the reduction in registration fees was tied as closely as possible to the axle tax likely to be imposed on vehicles of the various weight classes, there may be a few vehicles for which the reduction in registration fee was $36 greater or less than the axle tax liability.

[5] Under the International Registration Plan ("IRP"), to which Pennsylvania and 33 other states belong, the discrimination experienced by some non-Pennsylvania-based truckers may be ameliorated to a degree by the registration fee reduction; similarly, Pennsylvania-based truckers may be unable, if they operate in other IRP states, to realize the full advantage conferred on them by the registration fee reduction. The operation of the IRP is discussed briefly by the court below at J.S. App. 5a & n.2. For the reasons explained by the dissent (*id.* at 45a-46a), the IRP is not material to the legal issues involved in this appeal.

Even apart from the reduction in registration fees, the axle tax has a disparate impact upon Pennsylvania-based and non-Pennsylvania-based vehicles. Because the axle tax is a fixed amount, its per-mile cost declines with increased use of Pennsylvania's highways. And because the average Pennsylvania-based vehicle drives many more miles on the State's highways than the typical non-Pennsylvania-based vehicle, the cost of the axle tax, like that of the marker fee that preceded it, falls disproportionately on out-of-state vehicles. Evidence introduced by ATA in the marker fee case, based principally on state tax records and responses to a survey conducted by ATA, showed that in 1981 Pennsylvania-based trucks traveled an average of nearly 26,000 miles each on the State's roads, while foreign-based trucks averaged slightly over 4,500 miles apiece. These data, which bear on the impact of the axle tax as well as the marker fee, reflect an average per-mile tax cost for vehicles registered outside of Pennsylvania that is more than 5.5 times the cost for in-state vehicles. See R. 465.[6]

B. The Proceedings Below.

The subject of this appeal is the judgment of the Supreme Court of Pennsylvania in three consolidated cases, each of which was originally brought by appellants in the Commonwealth Court.

1. The first of those cases (*"ATA I"*), brought in February 1982, challenged the validity of the marker fee statute under the Commerce Clause of the United States Constitution.[7] The statute was challenged for two

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[6] Appellees objected to the admission of these computations on hearsay and other grounds, but their objection was overruled by the Commonwealth Court. The Pennsylvania Supreme Court did not pass upon the admissibility of the evidence because it considered disparity of impact to be immaterial to the Commerce Clause analysis (see J.S. App. 28a).

[7] In the state courts, appellants also attacked the tax statutes on equal protection, uniformity, and privileges and immunities

reasons. First, because by its terms it applied only to trucks registered outside Pennsylvania, the marker fee was attacked as facially discriminatory. Second, because of its substantially disparate impact on Pennsylvania-based and non-Pennsylvania-based trucks arising from their different highway use patterns, the marker fee was challenged as discriminatory in effect. The complaint sought a declaration of invalidity of the marker fee, an injunction against its enforcement, and refunds of fees paid thereunder.

Following the certification of a plaintiff class consisting of non-Pennsylvania-based interstate motor carriers subject to the marker fee requirement (see J.S. App. 10a), the Commonwealth Court held the marker tax facially discriminatory and therefore unconstitutional under the Commerce Clause. The court based its ruling on the manner of adoption of the marker fee system, which impermissibly placed the entire burden of the tax on vehicles registered outside of Pennsylvania (J.S. App. 70a-72a). In view of that holding, the court found no need to consider appellants' contention that the fee was unconstitutional because of its discriminatory effect in terms of cost per mile (*id.* at 73a). The en banc Commonwealth Court overruled appellees' objections to these findings and also found the marker fee invalid, relying on essentially the same grounds as the initial decision (*id.* at 52a-57a).

2. The second suit (*"ATA II"*) was a class action brought by appellants in the Commonwealth Court in January 1983, on the heels of enactment of the axle tax and in advance of its effective date. On cross-motions for summary judgment, appellants prevailed before the en banc Commonwealth Court, which found the tax fa-

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grounds. Because these grounds overlap so substantially with the claims rooted in the Commerce Clause, their applicability is not separately argued herein.

cially discriminatory against interstate commerce (J.S. App. 61a):

> Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

Relying on *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the court declared the axle tax statute unconstitutional and, pursuant to the parties' stipulations, ordered refunds of the improperly exacted taxes (J.S. App. 61a-62a). Again, because the court found the tax facially discriminatory, it did not consider the challenge based on discriminatory effect (*id.* at 62a n.4).

3. The final action ("*ATA III*"), filed by appellants in January 1984, sought a refund of marker fees paid between August 1980 and March 1982—relief that appellants had inadvertently neglected to demand in *ATA I*. Appellees filed preliminary objections to the jurisdiction of the Commonwealth Court, claiming that appellants were obliged to exhaust their administrative refund remedy before the Board of Finance and Revenue prior to seeking judicial relief. The en banc Commonwealth Court sustained the objections to its jurisdiction. J.S. App. E.

4. The losing parties in each of the three cases appealed to the Supreme Court of Pennsylvania, which, in a split decision, reversed the lower court and upheld the constitutionality of both the marker fee and the axle tax statutes. J.S. App. A.

The court first considered whether the marker fee was facially discriminatory and concluded, after reviewing the language and history of the enactment, that it was not (J.S. App. 22a-24a). It then turned to the argument that the marker fee was discriminatory in operation because, not being proportioned to the extent of highway use, it imposed higher per-mile costs on trucks registered outside of Pennsylvania (which generally make substantially less use of its highways) than on trucks registered in the State. The court viewed this contention as raising an objection under the "fourth facet" of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), *i.e.*, whether the fee is "fairly related" to the services provided by the State (J.S. App. 24a).[8] Because of the high costs of maintaining Pensylvania's highways, the court found that the marker fee was not excessive or manifestly disproportionate and therefore was "fairly related" to the highway construction and maintenance services provided by the State to out-of-state vehicles (*id.* at 29a). The court further explained (*id.* at 28a) (emphasis in original; footnote omitted):

> [T]he fact that a flat tax imposed upon all commerce, interstate and local alike, *may* have a greater impact upon interstate commerce, *if* such commerce actually uses the services or facilities less than local commerce, is inconsequential to our Commerce Clause analysis. Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them.

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[8] The court noted (J.S. App. 25a n.15) that appellants also challenged the discriminatory effect of the marker fee under the third prong of the *Complete Auto* test, which condemns state taxes that discriminate against interstate commerce.

Turning next to the axle tax, the court acknowledged the simultaneous reduction of registration fees that accompanied enactment of the tax and characterized the discrimination argument as "[a]t first blush . . . appealing" (J.S. App. 31a). Nevertheless, it agreed with the State that the arrangement under which the burden of the tax fell almost entirely on out-of-state truckers was defensible as a "rational restructuring" of tax obligations (*ibid.*). The court stated that it "need go no further" (*id.* at 32a) than a comparison of the axle tax to the much higher registration fees, which it believed demonstrated that vehicles registered in Pennsylvania still were required to pay more for the privilege of using the State's highways than were their non-Pennsylvania counterparts (*id.* at 33a):

> [C]onsidered in conjunction with all other provisions of Pennsylvania's highway user fee system, [the axle tax] works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

The court observed that the revenues generated by the axle tax—approximately $68 million in fiscal 1983-84—were less than the expenditures on bridge maintenance and improvement to which the tax proceeds are statutorily committed (J.S. App. 34a), and that any discriminatory or protectionist motive the legislature may have held is immaterial if the tax is otherwise lawful (*id.* at 34a-35a).[9]

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[9] Finally, the court concluded that the other constitutional challenges to the marker fee and the axle tax were effectively disposed of by the finding that the taxes do not discriminate against interstate commerce, and that its disposition of the merits in *ATA I* and *ATA II* made it unnecessary to resolve the jurisdictional issue in *ATA III*. J.A. App. 35a-36a.

Two justices dissented with respect to the constitutionality of the axle tax. In an opinion by Chief Justice Nix, they concluded that the axle tax violated the Commerce Clause because its burden fell almost entirely upon non-Pennsylvania-based truckers. The dissent first noted (J.S. App. 39a) that it is "incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect." Doing so, the dissent concluded (*id.* at 41a) that the reductions in registration fees that accompanied adoption of the axle tax gave that tax an "unequal financial impact" that facially discriminated against interstate commerce. The dissent further observed (*ibid.*) that "there is nothing in the statute itself or in the circumstances surrounding [its] enactment" to support the court's conclusion that the statute was intended to effect a "rational restructuring" of tax burdens; instead, the expressed purpose was the parochial one of providing jobs for Pennsylvania's unemployed.

The dissent also explained the fallacy of the pivotal part of the court's holding—that any discrimination in the imposition of the axle tax is justified by the supposition that it merely compensates for registration fees, which are paid only by locally-based trucks (J.S. App. 44a-45a) (emphasis in original; footnote omitted):

> What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. . . . The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.

THE QUESTION IS SUBSTANTIAL

The instant appeal brings before this Court two important questions concerning the limitations imposed by the Commerce Clause on the taxing powers of the states. The first of these involves an issue that has produced a square conflict between the decision below and a decision earlier this year by the Supreme Court of Vermont; moreover, the central proposition on which the decision below rests has been squarely and unequivocally rejected by the highest courts of Maine and New Hampshire. In addition to being important in their own right, the issues are part of an emerging pattern of state taxation of interstate truckers that raises problems ripe for consideration by this Court.

The decade of the 1980's has seen an upsurge in discriminatory state highway tax legislation designed to favor operations of trucks registered in the taxing state over out-of-state operators. The first of these was the Pennsylvania marker fee challenged in this case, which was enacted in 1980. This was followed in 1981 by a Vermont enactment taxing trucks registered outside Vermont $40 per year plus $15 for each entry into that State, a Connecticut law raising its fuel marker fee for out-of-state trucks from $5 to $40, and a Maine statute requiring out-of-state trucks to pay a $50 annual highway use fee; in 1982 by Vermont and Maryland fuel marker taxes of $50 and $25 per truck, respectively; in 1983 by Arkansas' $175 highway use equalization tax on large trucks [10] and Pennsylvania's axle tax; in 1984 by New Jersey's $25 marker fee; in 1985 by a flat Indiana supplemental highway user fee of $50; and in 1986 by Kentucky's adoption of a $150-$200 highway user tax

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[10] The Arkansas tax is the subject of a separate appeal to this Court. See *American Trucking Associations, Inc.* v. *Gray*, 709 S.W.2d 410 (Ark. 1986), appeal docketed, No. 86- (Sept. 3, 1986). Copies of the Jurisdictional Statement in that case have been served on counsel for appellees.

on large trucks.[11] The amounts of money such taxes exact from interstate motor carriers are substantial. The Pennsylvania axle tax, for example, generated an estimated $68 million in fiscal 1983 alone (J.S. App. 34a).

These states have utilized two separate mechanisms to shift a disproportionate share of the burden of their highway use taxes from their own domiciliaries to out-of-state operators. The first involves outright discrimination in the design of the tax. Some taxes by their terms apply only to trucks registered outside the state or impose a higher tax on such trucks than on in-state trucks. For example, the Maine law described above required payment of a $40 annual highway use tax by out-of-state trucks, while requiring Maine-registered trucks to pay no more than $3. See *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981). Only slightly more subtle is Pennsylvania's manipulation of its tax system, imposing what appears to be a facially neutral axle tax while simultaneously providing offsetting reductions in registration fees to Pennsylvania-based truckers.

The second mechanism for discrimination is the adoption of flat taxes that are paid by both in-state and out-of-state truckers but that in fact favor local truckers because of their disparate cost-per-mile impact on the two classes.[12] Pennsylvania's marker fee and axle tax both

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[11] Appendix K provides a state-by-state summary of discriminatory and retaliatory taxes now in effect or recently invalidated by the courts, as well as of pending litigation challenging such taxes.

[12] Many of the discriminatory taxes of this type are not, strictly speaking, pure flat taxes—*i.e.*, taxes of fixed amount regardless of the extent of highway use. In the case of Pennsylvania, the $25 marker fee is a pure flat tax, but the axle tax is proportional for the first 2,000 miles of highway use. For example, in the case of a five-axle truck, for which the maximum tax is $180 per year, the tax is perhaps most accurately described as being at a rate of

possess these attributes. Because such flat taxes are not proportional to the extent of a vehicle's highway use within the taxing state, they impose per-mile costs that are much lower for heavy users of the highways than for less frequent users. And the heavy users with low per-mile tax costs are principally in-state operators—as the ATA study introduced in evidence demonstrated (see page 6, *supra*).

Conversely, interstate truckers based outside Pennsylvania tend to use its highways less and to suffer substantially higher tax costs per mile. The cumulative problems that widespread adoption of such taxes (and seven states already have them) create for businesses that operate in many states can readily be imagined; they are discussed in more detail at pages 18-19 of the Jurisdictional Statement in *American Trucking Associations, Inc.* v. *Gray* (see note 10, *supra*).

These taxes not only burden interstate commerce directly but also multiply the discriminations it suffers by precipitating retaliatory, mirror-image taxes in other states. Some 22 states have enacted statutes empowering their revenue or highway officials to retaliate against states that have discriminatory or unconventional taxes by imposing on trucks registered in those states the same taxes that the target states impose on the retaliating state's trucks. Eight states—Florida, Georgia, Maine, Nebraska, New Hampshire, New Jersey, Oklahoma, and Vermont—have already exercised this authority and retaliated specifically against Pennsylvania truckers on ac-

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9¢ per mile for the first 2,000 miles, with no further tax for additional highway use, no matter how extensive.

While some of these discriminatory state highway tax schemes thus have mechanisms to permit light users to pay somewhat less in absolute terms, the dominant feature of all of them is the ability of heavy users to obtain markedly lower per-mile tax costs. The expression "flat tax" or "non-proportional tax" is used herein to denominate taxes that have this attribute.

count of the axle tax. See J.S. App. K. This is precisely the kind of trade war that the Commerce Clause was meant to foreclose. See *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946).

The interstate trucking industry is more than willing to shoulder its share of the costs of maintaining the states' highway systems by paying taxes and fees that fairly apportion responsibility for wear and tear to those highways. But it objects to the kind of parochial and protectionist legislation reflected in the array of state laws described above. Because of such parochial legislation, the legality of discriminatory highway use taxes is an issue of substantial and growing national importance that demands the attention of this Court.[13] Moreover, as we show in the argument that follows, the Pennsylvania marker fee and axle tax are plainly unconstitutional. Indeed, the highest courts of Maine, New Hampshire, and Vermont have invalidated similar or identical highway use statutes under the Commerce Clause.

A. The Axle Tax Is Structured To Discriminate Against Trucks Registered In States Other Than Pennsylvania.

As recounted in the Statement, when Pennsylvania adopted the axle tax, which on its face appears to apply equally to Pennsylvania-based and out-of-state vehicles, it simultaneously reduced registration fees for in-state vehicles by the identical amount. See page 5, *supra*. As a result, beginning in April 1983, the owner of a vehicle registered in New York who wished to engage in interstate commerce on Pennsylvania's highways had to pay a new tax of $36 per axle for the privilege. If the same vehicle were registered in Pennsylvania, how-

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[13] An appeal is being taken simultaneously herewith from a decision by the Supreme Court of Arkansas sustaining that State's Highway Use Equalization tax, another tax not proportioned to highway use and thus discriminatory in operation. See note 10, *supra*, and pages 24-25, *infra*.

ever, it would not have had to pay a penny more to Pennsylvania in order to conduct identical operations on the same highways.

The court below acknowledged (J.S. App. 30a-31a) this feature of the axle tax legislation and the State's concession that the legislature "intended to lessen the burden imposed upon 'local commerce'" (*id. at* 31a) when it gave offsetting registration fee reductions to local truckers. It nevertheless held (*id.* at 31a-34a) that it was permissible to impose the new tax solely upon non-Pennsylvania-registered trucks because the total Pennsylvania tax and fee burden on in-state trucks purportedly remained substantially greater than that on out-of-state trucks. In so ruling, the court placed itself in conflict with decisions of the highest courts of several states and with basic principles of Commerce Clause jurisprudence.

1. *The Decision of the Pennsylvania Supreme Court Conflicts With Decisions of Other State Supreme Courts.*

Shortly before Pennsylvania enacted the axle tax, Vermont engaged in the same kind of "restructuring" of its tax system. In 1982, it adopted a $50 annual fuel user's license fee that was nominally applicable to all trucks whether based within or outside Vermont, but as part of that legislative package it reduced registration fees for Vermont truckers by the same $50 amount. See Vt. Stat. Ann. tit. 23, §§ 367(a), 415, 3007, 3010 (Supp. 1982).[14]

Appellant ATA instituted class actions in both Vermont and Pennsylvania challenging these manipulations of the States' tax systems on the ground that they discriminated unconstitutionally against interstate commerce

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[14] This statute replaced a system of entry fees imposed exclusively on out-of-state vehicles. See J.S. App. 92a.

by imposing a tax that effectively applied only to out-of-state trucks. Within three months of one another, the Supreme Court of Vermont sustained ATA's constitutional challenge (*American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408 (1986)), while the Supreme Court of Pennsylvania rejected the identical legal claim in the decision that is the subject of the instant appeal.[15]

The Vermont Supreme Court unequivocally recognized in *Conway* that statutory legerdemain of the kind challenged in both cases "discriminate[s] against interstate commerce by providing a direct commercial advantage to [local] truckers" (508 A.2d at 412). It also explained why the central postulate of the Pennsylvania Supreme Court's analysis—that registration fees "complement" and therefore offset highway user fees—is incorrect and cannot justify the blatant discrimination (*id.* at 412-413). To the same effect are the holdings of the Maine Supreme Judicial Court (*American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623, 626-27 (1981)) and the New Hampshire Supreme Court (*Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (August 12, 1986)),[16] the latter court noted (slip op. 4) that its decision was contrary to that of the Pennsylvania Supreme Court in this case.[17]

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[15] ATA has petitioned for a writ of certiorari to review the portion of the holding in *Conway* refusing to order a refund of the taxes held to have been unconstitutionally exacted. No. 86-69 (filed July 21, 1986). Copies of that petition have been sent to appellees' counsel. Vermont has filed a conditional cross-petition in response (No. 86-276, filed Aug. 22, 1986), raising the same Commerce Clause issue regarding the fuel user's license fee as we raise here with respect to the axle tax and noting the conflict in decisions between *Conway* and the instant case.

[16] Copies of this opinion are being lodged with the Clerk of this Court and served on counsel for appellees.

[17] This point is discussed more fully at pages 21-24, *infra*.

This conflict among state supreme courts on a constitutional question of substantial practical importance demands resolution by this Court. See Sup. Ct. R. 17.1(b); *Fuller* v. *Oregon*, 417 U.S. 40, 42 & n.3 (1974).

2. *The Decision Below Misapplies This Court's Commerce Clause Jurisprudence.*

The decision below cannot be squared with fundamental principles of Commerce Clause jurisprudence. The Court recognized in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), that a state may impose taxes upon interstate commerce, which can be made to pay its fair share for use of state tax-supported facilities and services. But *Complete Auto* also strictly cabined this power, ruling that taxes imposed on interstate commerce must be fairly related to activities within and services provided by the taxing state and must not discriminate against interstate commerce. This principle was summarized in *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981):

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange*, *supra*. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

The most obvious type of impermissible discrimination against interstate commerce is a tax or charge that on its face applies solely to the activities of businesses domi-

ciled outside the taxing state or exempts from its reach some or all locally based activity. Except in narrowly limited circumstances in which a facially discriminatory tax can be found to "compensate" for an equivalent tax that is applied exclusively to in-state transactions or domiciliaries (see pages 21-24, *infra*), such a tax is prohibited. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984).

The principle that a facially discriminatory state tax violates the Commerce Clause has regularly been applied by state and federal courts to invalidate taxes imposed on interstate trucking. In *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 405 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276, 55 U.S.L.W. 3032 (U.S., July 21 and Aug. 22, 1986), the Supreme Court of Vermont struck down a system of entry fees imposed solely on trucks registered outside Vermont, finding them to be placed impermissibly "at a competitive disadvantage" (*id.* at 407) by the tax. In *American Trucking Associations, Inc.* v. *Quinn*, *supra*, the Maine Supreme Judicial Court found "egregious discrimination against interstate commerce" (437 A.2d at 627) in a Maine statute requiring operators of out-of-state trucks to pay a highway use fee of $40 annually when their Maine counterparts were either exempted entirely or subjected to a fee of only $3. In *American Trucking Associations, Inc.* v. *O'Neill*, 522 F.Supp. 49 (D. Conn. 1981), the district court preliminarily enjoined a $40 fuel marker tax that applied exclusively to vehicles registered outside Connecticut. In *Private Truck Council of America, Inc.* v. *New Hampshire*, *supra*, the Supreme Court of New Hampshire held unconstitutional a system of retaliatory taxes imposed against trucks registered in certain other states (including Pennsylvania because of its axle tax). In *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 106 S.Ct. 1997

(1986), the Supreme Judicial Court of Maine struck down a system of selective "reciprocal taxes." See also *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E. 2d 435 (Ind. 1984).

Of course, Pennsylvania's axle tax is by its terms applicable to all trucks weighing more than 26,000 pounds, wherever registered. But it is settled that a claim of discrimination cannot be rebutted by consideration of a single statutory provision in isolation. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. at 756. In that case, Louisiana's first use tax on natural gas was found to discriminate unlawfully against interstate commerce because, as the result of various credits and exclusions, local producers and consumers were effectively exempted from the tax (*id.* at 756-758). Here, the same enactment that created the axle tax (Act 234) simultaneously made equal reductions in registration fees for Pennsylvania vehicles subject to the new tax (see J.S. App. 39a-41a), resulting in a scheme that, viewed as a whole, taxes non-Pennsylvania domiciliaries while sheltering local interests. Such a scheme is indistinguishable under the Commerce Clause from one in which the axle tax is imposed solely on out-of-state vehicles.

3. *The Discrimination Produced by Manipulation of Pennsylvania's Registration Fees Cannot Be Justified Under the Compensatory Tax Doctrine.*

The Supreme Court of Pennsylvania did not dispute the premise that the manipulation of registration fees accompanying adoption of the axle tax amounted to imposing the latter only upon interstate commerce (see J.S. App. 30a-31a). Rather, it misconstrued the above-described principle of *Maryland* v. *Louisiana* by asserting that consideration of the entire Pennsylvania scheme of fees and taxes showed that the State was justified in

effectively imposing the new tax only on out-of-state vehicles (*id.* at 31a-32a). In particular, the court posited that vehicles based in Pennsylvania must pay not only the axle tax but also a registration fee that, even after being reduced to neutralize the effect of the axle tax, remains substantially larger than any payment made directly to Pennsylvania by operators of out-of-state vehicles.

In support of its conclusion, the court below cited several decisions of this Court applying what is known as the "compensatory" or "complementary" tax doctrine, under which state taxes imposed only on interstate commerce may be sustained if legally equivalent to other taxes imposed only on in-state interests (J.S. App. 33a-34a). As recognized by the dissent and by three other state supreme courts that have considered similar arguments, the conclusion that discriminatory highway use taxes can be saved by reference to registration fees paid by locally-based vehicles is riddled with errors.

a. The principal flaw arises from an apparent misunderstanding about the nature and function of vehicle registration fees. As Chief Justice Nix pointed out in dissent (J.A. App. 44a):

> What the majority ignores . . . is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. Just as Pennsylvania-registered vehicles pay a registration fee to the state of Pennsylvania, so do out-of-state registered vehicles pay such a fee in their respective jurisdictions.

Moreover, by virtue of reciprocity agreements entered into among the states, including Pennsylvania, the registration fee paid to Pennsylvania by its domiciliary vehicles purchases the right to operate those vehicles in other states; conversely, trucks registered outside Pennsylvania have thereby acquired the right to operate in Pennsylvania (see J.S. App. 88a-91a). Thus, while Pennsylvania may still tax the use of its highways to defray the

costs of maintenance, what is covered by the registration fee—access to highways in the many states with which Pennsylvania has reciprocity arrangements—is not a "substantially equivalent event" (see *Maryland* v. *Louisiana*, 451 U.S. at 759; *Armco Inc.*, 467 U.S. at 643) to Pennsylvania highway use. It is precisely this point that caused the highest courts of New Hampshire, Vermont, and Maine to reject the contention that registration fees could be held to complement or compensate for otherwise discriminatory highway use charges. See *Private Truck Council of America, Inc.* v. *New Hampshire*, *supra*, slip op. 4 ("[r]egistration fees for resident vehicles cannot be compensated for by taxes imposed against out-of-state vehicles because all vehicles pay registration fees in their own states, which entitle them to operate in all states with registration reciprocity"); *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412-413; *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d at 626-627.

b. Even if registration fees could in appropriate circumstances be considered complementary to highway use taxes, the requisites for such equivalence are entirely lacking here. Plainly, the mere fact that registration fees are substantially larger than the axle tax, on which the Pennsylvania Supreme Court placed heavy emphasis, is of no consequence. See *Armco Inc.*, 467 U.S. at 642-643 (holding that a manufacturing tax was not complementary even though far higher than the wholesaling tax); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenues*, 460 U.S. 575 (1983) (holding that Minnesota's valid general sales tax, though considerably greater, was not complementary to a paper and ink tax found to discriminate in violation of the First Amendment). Moreover, the court could not point to anything in the history of the axle tax legislation to support the conclusion that its provisions were the product of an effort by the legislature to accomplish a "rational restructuring" of Pennsylvania's highway tax burdens. The leg-

islative history is barren of *any* economic analysis showing that out-of-state truckers were in fact bearing less than their fair share of highway costs under the previously existing tax system. Nor does it reflect *any* consideration of the structure and size of adjustments needed to equalize burdens.[18]

In addition, it is not consistent with Commerce Clause requirements to permit state courts to rationalize discriminations against interstate commerce on a post hoc basis. The legislature did not designate what portion of the registration fee is allotted to highway use within Pennsylvania, and this Court, in reviewing the constitutionality of the tax, would have no way of answering that question. See *Armco Inc.*, 467 U.S. at 643 ("[m]anufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales"). Under these circumstances, Chief Justice Nix's conclusion was surely correct (J.S. App. 45a) (emphasis in original; footnotes omitted):

> The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored.

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[18] In fact, there is strong evidence that the "rational restructuring" justification is a fiction. Registration fees were not reduced across the board for Pennsylvania-based trucks, which should have been done if the reductions that were made truly reflected a determination that local commerce was burdened with an excessive share of highway costs. Rather, fees were reduced only for vehicles weighing more than 26,000 pounds—the group to which the new axle tax was being applied. The result of this "rational restructuring" was that, although registration fees ordinarily increase with truck weight, the $270 registration fee for Class 8 vehicles (21,000-26,000 pounds) is higher than the $243 fee for Class 9 vehicles (26,001-30,000 pounds). 75 Pa. Cons. Stat. Ann. § 1916(a) (J.S. App. 87a).

In the absence of clear evidence of an actual compensatory purpose, and of a carefully measured complementary effect, a tax paid by each business in its state of domicile cannot be held to justify an otherwise discriminatory tax imposed solely on interstate commerce. The Pennsylvania Supreme Court stands alone in upholding this kind of facially discriminatory highway use tax scheme against Commerce Clause attack. Its decision demands plenary review by this Court.

B. The Axle Tax And The Marker Fee Impermissibly Favor Local Over Interstate Commerce Because They Are Not Proportioned To Amount Of Highway Use.

Even if the structurally discriminatory feature of the axle tax were eliminated, both it and the marker fee that preceded it would still be constitutionally objectionable because they discriminate in practical effect against vehicles registered outside Pennsylvania. Both taxes have as their purpose compensation for wear and tear to the State's highways caused by the operation of large trucks. The marker fee was a flat $25 per year, whether the vehicle drove 100 miles or 100,000 miles in Pennsylvania. Likewise, the axle tax, while apportioned for the first 2,000 miles of highway use, does not increase with further operations and therefore also produces dramatically lower per-mile costs for heavy users of the highways than for less frequent users. There is no fair relation between this method of taxation and the wear and tear to the highways that interstate commerce causes. Each of the taxes accordingly offends the Commerce Clause by failing both the anti-discrimination (third prong) and the fair relationship (fourth prong) requirements of the *Complete Auto* test.

The issue of discriminatory effect in this case is virtually indistinguishable from that presented by the appeal in *American Trucking Associations, Inc.* v. *Gray*, 709 S.W.2d 410 (Ark. 1986), appeal docketed, No. 86-—— (Sept. 3, 1986). In both cases the record demonstrates

that flat or non-proportional taxes confer substantial advantages on in-state vehicles over their out-of-state competitors, because the former generally make much greater use of the highways in their home state and therefore are able to reduce their per-mile tax costs well below those of the latter. Like *Gray*, this case also demonstrates that it is entirely feasible to utilize methods of taxation that are reasonably apportioned to the activity or service generating the tax.

The Jurisdictional Statement in *Gray* fully explains the reasons why plenary review of the constitutionality of flat or non-proportional highway use taxes is warranted. We rely on those arguments in support of review in this case.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

Of Counsel:
WILLIAM S. BUSKER
Vice President,
Legal Affairs
American Trucking
Associations, Inc.
Alexandria, VA 22314

WALTER HELLERSTEIN
Professor of Law
University of Georgia
Law School
Athens, GA 30602

ARTHUR R. LITTLETON
Hoyle, Morris & Kerr
Philadelphia, PA 19102

MARK P. PAZUHANICH
Hanna, Young & Upright
Stroudsburg, PA 18360

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Appellants